In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 437

THOMAS GOTTONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 11-14) is reported at 345 F. 2d 165. The findings of the district court (Pet. 8-10) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1965. The petition for a writ of certiorari was filed on August 9, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the materials seized from petitioner were properly found to be subject to seizure as instrumentalities of a crime.

2. Whether it was proper for the district court to disregard petitioner's testimony on the ground that he invoked the privilege against self-incrimination during cross-examination.

STATEMENT

Petitioner moved in the United States District Court for Colorado (R. 1-4) for the return of evidence seized under search warrants authorizing the seizure of "bookmaking records and wagering paraphernalia consisting of memoranda of wagers made, bet slips, account sheets or books relating to wagers, bettors' code identification list; recap sheet or sheets, schedules of sporting events on which point spreads (the line) are recorded, and money used in or derived from a bookmaking operation" (R. 5, 7, 9). Petitioner claimed that the items seized were evidence and not instrumentalities of a crime. Seized under the warrants were a list of names and addresses (Ex. 2, R. 38), $98 in currency (R. 25), notations and memoranda (Ex. 1, R. 33; Exs. 3-9, R. 24, 26, 39-41, 43-45; Ex. 11, R. 49; Exs. 14-16, R. 50-52; Ex. 20, R. 55-56), and race-track programs with markings showing results (R. 31; Ex. 10, R. 45; Exs. 12-13, R. 48-49). Petitioner testified at the hearing on the motion to suppress that nothing taken was used in connection with the

business of accepting wagers (R. 28). On cross-examination, petitioner was shown an exhibit reading "Dodgers 13-10-20, Pittsburgh-St. Louis 7-10" and some initials (R. 32), and was asked to explain the initials (R. 33). He declined to answer on the ground that his answer would incriminate him (R. 33-34). Petitioner also claimed the privilege against self-incrimination as to the other exhibits (R. 45, 48, 49, 51-52, 56), and to questions such as whether he had taken bets from persons whose names appeared on Exhibit 2 (R. 37-39, 41-42).

The district court ordered the return of two slips but declined to order the return of the other materials on the ground that they constituted "bookkeeping [*sic*] records and/or wagering paraphernalia as described in the various search warrants, and that the various sheets of paper introduced in evidence constitute bookkeeping records of the petitioner" (Pet. App. 9). It also found that the currency was not subject to return (Pet. App. 10).

The court of appeals affirmed the order of the district court.[1] It noted that the various memoranda appeared to be odds and wagers on sporting events, and that the list of names, accompanied by unexplained symbols, could be a betting list, particularly in conjunction with the other articles. The court concluded that the district court's finding that all the items in issue were instrumentalities of a crime was

[1] The court held that the order was appealable since petitioner was not under arrest and no information or indictment was outstanding against him (Pet. 12).

not clearly erroneous.[2] With respect to petitioner's testimony that none of the items was an instrument of accepting wagers, the court of appeals ruled that since petitioner had invoked the privilege against self-incrimination during cross-examination upon such testimony, "his testimony has no probative value and does not aid in determining the nature of the seized papers nor in sustaining his burden of showing a right to the return of the property" (Pet. 13).

ARGUMENT

1. The various memoranda seized in this case show on their face that they were the kind of slips used in the gambling business—*i.e.*, notations of wagers on games or races and records from which "pay-offs" could be computed. The list of names, when considered in relation to these other materials, also constituted means of carrying on the business. Under the circumstances, the court below properly held that the articles were subject to seizure under the warrants. *United States* v. *Clancy*, 276 F. 2d 617, 629-630 (C.A. 7), reversed on other grounds, 365 U.S. 312; *Merritt* v. *United States*, 249 F. 2d 19, 21 (C.A. 6); see *Marron* v. *United States*, 275 U.S. 192, 198-199; *Abel* v. *United States*, 362 U.S. 217, 237.

2. The court of appeals' treatment of petitioner's reliance on the privilege against self-incrimination was manifestly correct. This Court held in *Brown* v.

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[2] The court expressed some doubt regarding the money but found it unnecessary to decide that issue since petitioner did not press for its return. Pet. 14, n. 2.

United States, 356 U.S. 148, that a witness who voluntarily takes the stand waives that privilege with respect to the subject matter of his direct testimony, and that he may be held in contempt for refusing to answer relevant questions on cross-examination. The district court here did not resort to this remedy but chose merely to disregard petitioner's testimony. Even the dissenters in the *Brown* case (356 U.S. at 160) observed that "such one-sided testimony might be struck in full or part, if the occasion warranted." In the absence of petitioner's testimony, there was no evidence whatever rebutting the natural inference to which the seized materials, on their face, gave rise. The district court therefore correctly concluded that petitioner had failed to satisfy his burden of proof.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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